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## ***Public Nuisance and Private Purpose: Policed Environments in British India, 1860-1947***

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# SOAS Law Department

## WORKING PAPERS

**Public Nuisance and Private Purpose:  
Policed Environments in British India, 1860–1947**

by

Michael R Anderson

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**Public Nuisance and Private Purpose:  
Policed Environments in British India, 1860 - 1947**

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**I**

In the 1980s, a number of Indian legal activists sought out legal provisions which might be deployed to redress environmental claims. In an early decision which helped to unleash the genie of public interest litigation, Justice Krishna Iyer seized upon the criminal law doctrine of public nuisance, and sought to imbue it with 'the new social justice orientation' imparted by the Constitution.<sup>2</sup> Thereafter, a new enthusiasm for public nuisance was joined. Judges and academics championed public nuisance as a vehicle for redressing government inaction, and proclaimed a new judicial sympathy for populist environmental movements.<sup>3</sup> It became commonplace in legal circles to note that criminal law held great potential for environmental protection, but that it had never been properly arrayed against the forces of pollution and resource degradation.<sup>4</sup> The doctrine of nuisance, it seemed, was innocent of historical usage: a moribund tool of 'ancient vintage' that could be pressed into useful service with only a

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<sup>1</sup> Dept of Law, SOAS, London. An earlier version of this paper was presented at a conference on India's Changing Environment (Bellagio, Italy, 16-20 March 1992).

<sup>2</sup> *Ratlam Municipality v Vardichand* AIR 1980 SC 1622, at 1628.

<sup>3</sup> *Krishna Gopal v State of Madhya Pradesh* (1986) Cr LJ 396; P. Leelakrishnan, 'Law of Public Nuisance: A Tool for Environmental Protection' *Journal of the Indian Law Institute*, 28, 1986; B. Desai, *Water Pollution* (Delhi, 1990); C.M. Abraham, 'The Indian Judiciary and the Development of Environmental Law' *South Asia Research*, 11, 1991, p. 64.

<sup>4</sup> See, for instance, V.S. Mani, 'Legal Controls of River Pollution in India: A Preliminary Inquiry' in R.P. Anand, R. Khan, and S. Bhatt, eds., *Law, Science, & Environment* (Delhi, 1987) p. 55.

modicum of jurisprudential polish. While it is true that there has been very little reported case law in the field of public nuisance since 1940,<sup>5</sup> a closer examination of the historical record reveals a story of frequent convictions under the authority of colonial magistrates.<sup>6</sup> Indeed, convictions for public nuisance were generally more common than under any other criminal category after 1870, representing the most frequent and systematic application of police power under colonial rule. And yet, current historiography has been virtually blind to this large coercive project, opting instead to stress organic processes of the *longue durée* or isolated points of quasi-organisational rebellion. Meanwhile, it seems that nuisance played a key role in the control of the environment and the experience of colonial rule. In light of recent concerns, then, it seems worth enquiring into the character of public nuisance in the colonial period, with particular attention to the role of the state in social conflicts involving environmental resources.

Tracing the way in which public nuisance was applied -- and resisted -- it is possible to see how the physical environment became a terrain of social struggle with both material and ideational dimensions. The thesis here is that after 1860, and particularly in the period between 1870 and 1920, the colonial state used the twin devices of property law and criminal law to sustain a massive intervention in the social use of the physical environment. As land, waterways, and plants were appropriated for 'public' use, individuals and communities were dispossessed of their customary entitlements to common property resources. These exclusions were enforced with an intensive form of state policing which also helped to effect the transfer of resources into the hands of entrepreneurs and a middle class concerned to regulate

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<sup>5</sup> The most comprehensive textbook in these matters, *Gour's Penal Law of India* (Tenth edition, Allahabad, 1983), cites 126 Indian decisions as legal precedents under the relevant Penal Code provisions (Ss. 168-178), but only 9 of these date from the period after 1940, and largest proportion date from before 1900.

<sup>6</sup> See Table 1, below.

public space. Far from being a legal epiphenomenon, the doctrine of public nuisance ushered in a transformation of the physical environment which entailed profound alterations in people's notions of themselves, their ideas of collective entitlements, and the conduct of everyday life. Public nuisance provided the conceptual architecture for a new ordering of public space -- a space that was closely involved with the material and symbolic bases of a new middle class hegemony.

## II

Though the principle of public nuisance was imported to India from English common law, it seems that similar concepts prevailed in many precolonial regimes. A survey of precolonial practice is beyond the scope of this essay, but textual sources consider the matter in some detail. Kautilya's *Arthashastra*, for example, prescribes penalties for obstructing roads, damaging water reservoirs, and carelessly disposing of animal carcasses.<sup>7</sup> Similarly, Manu recommends punishment for anyone who damages a public water supply or who 'excretes anything impure on the royal highway'.<sup>8</sup> The broad medieval consensus on the royal duty to maintain towns, trade routes, and irrigation works<sup>9</sup> was harnessed to coercive sanctions, and incorporated into the Mughal system of rule.<sup>10</sup> It is evident that despite the efforts of eighteenth-century regimes to maintain roads and waterways for public use, many had fallen into physical

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<sup>7</sup> [3.10.5; 4.11.17; and 2.36.30] M.S. Srinivas, ed., *Kautilya's Arthashastra* (Mysore, 1956). A useful if anachronic survey of this material is available in K.M. Agrawal, *Kautilya on Crime and Punishment* (Almora, 1990), chap. 9.

<sup>8</sup> [9.279-283] Wendy Doniger, trans., *The Laws of Manu* (London, 1991), p. 227.

<sup>9</sup> See for example, Rajendra Lal Mitra (ed.) *The Nitisastra [Elements of polity] by Kamandaki*, revised with an English translation by Sisir Kumar Mitra (Calcutta, 1982), [5.78-9].

<sup>10</sup> Associated with the duty of physical maintenance was that of military protection. JF Richards, *Mughal Administration in Golconda* (Oxford, 1975), p. 311.

decay by the 1780s.<sup>11</sup> The early Raj soon faced expectations to fulfil similar functions, and proceeded to establish public nuisance laws based upon English legal models. As things turned out, the indigenous and English legal impulses were partially complementary and partially contradictory. A common concern with public well-being is apparent, but unlike precolonial efforts to police public space, the colonial doctrine of nuisance was closely wedded to a regime of private property. The English law of 'nusans' applied where an occupier's use of land, or enjoyment of rights appertaining to land, were disturbed by the actions of a neighbour.<sup>12</sup> It evolved that a 'private' nuisance occurred in cases where only one or very few individuals were affected, while a 'public' nuisance was said to obtain when the public at large suffered some injury. As the direct descendant of English 'nusans' law, the Anglo-Indian law likewise adhered closely to personal property, affording a promise of protection against extrinsic interferences.

Although English public nuisance law was entirely judge-made, its colonial expression was statutory. An 1841 Act, for example, bestowed magistrate powers to suppress or remove 'trades or occupations injurious to the health or comfort of the community'.<sup>13</sup> At the same time, magistrates were instructed to be extra vigilant in the pursuit of persons committing acts of malicious public injury such as removing milestones, stealing drains or flagstones, and damaging bridges or roads.<sup>14</sup> In their earliest incarnations, public nuisance statutes simply replicated English judicial practice, but a more aggressively expansionist approach was adopted by the Law

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<sup>11</sup> See for example, C.A. Bayly, *Rulers, Townsmen and Bazaars: North Indian Society in the Age of British Expansion, 1770-1870* (Cambridge, 1983), pp. 154-162.

<sup>12</sup> J.R. Spencer, 'Public Nuisance -- A Critical Examination' 48 *Cambridge Law Journal* 55 (March 1989) at pp. 56-57.

<sup>13</sup> Bengal Act XXI of 1841, Sec 1, which bestowed similar powers relating to inflammable substances and unstable buildings.

<sup>14</sup> *Bengal Circular Order Sup. Pol. L.P. No. 5 of 1841*

Commissioners. Macaulay's draft penal code of 1837 made elaborate provision for 'Offenses affecting the Public Health, Safety and Convenience' including a clause for the punishment of any person who 'voluntarily causes the atmosphere in any public way to be in a state noxious to health or offensive to the senses'.<sup>15</sup> Though Macaulay took immediate inspiration on public nuisance from the Digest of English Criminal Law,<sup>16</sup> he seized the opportunity to draft a range of offenses beyond the ambit of traditional English law.<sup>17</sup> His programme for expanded state intervention garnered the criticism of Norton and other social conservatives suspicious of overzealous legislating.<sup>18</sup> Yet when the final version of the Penal Code was promulgated in 1860, it enlarged the public nuisance provisions even beyond Macaulay's plans. The Code introduced a catalogue of specific nuisances<sup>19</sup> as well as two omnibus sections to cover public nuisances in general.<sup>20</sup> One of the reasons that public nuisance was well-suited to a wide range of police actions was flexible definition in law. A wide definition had characterised the English jurisprudence,<sup>21</sup> and the various omnibus nuisance provisions could be made to apply to a great variety of conflicts. For those subject to colonial rule, the immediate effect of the Penal Code was to criminalise an entire spectrum of activities which, as JF Stephen noted, 'in England would not be

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<sup>15</sup> Indian Law Commission, *Penal Code* (Calcutta, 1837), clause 264.

<sup>16</sup> See Indian Law Commission, *Second Report on the Indian Penal Code* (Calcutta, 1846), para. 223.

<sup>17</sup> Including new provisions for reckless driving and expanded punishments for the adulterating of food.

<sup>18</sup> *Ibid.*, paras 223-239. See further, AC Patra, 'An Historical Introduction to the Indian Penal Code' *Journal of the Indian Law Institute*, 3, (1961), 351-366.

<sup>19</sup> The list is noteworthy both for its length and comprehensive scope, including: the negligent spreading of disease (Secs. 269-271), the adulteration or harmful sale of food and drugs (Secs. 272-276), the fouling of any public spring (Sec. 277), rendering the atmosphere noxious to health (Sec. 278), negligent driving of a vehicle (Sec. 279), and negligent conduct with respect to poisons, fire, explosives, animals, machinery, and construction or demolition work (Secs. 280-289).

<sup>20</sup> Ss. 268 & 290.

<sup>21</sup> Spencer, 'Public Nuisance'.

offenses at all, or in some cases, would not even be grounds for a civil action.<sup>22</sup> There was considerable scope for bringing these new Penal Code provisions into play, since a public nuisance could give rise to either criminal prosecution,<sup>23</sup> or civil litigation,<sup>24</sup> -- or both. Indeed, it became perfectly possible to be prosecuted by the state and sued by private parties at the same time.<sup>25</sup> In sum, the Penal Code intensified a trend toward state supervision of public space which had already been apparent under the East India Company.<sup>26</sup>

The social impact of the nuisance doctrine derived less from the rarefied conceptual strata of the Penal Code than from its swift incorporation into a host of local and municipal laws which endowed petty officials of nearly all varieties with new far-reaching powers.<sup>27</sup> Moreover, the strict regime of nuisances was introduced just as the formation of a larger and more effective police force was underway.<sup>28</sup> The 1861 Police Act<sup>29</sup> empowered the new constabulary to arrest without warrant any person found to be bathing, washing, or engaged in any other otherwise 'defiling' a public tank or well. It extended similar powers to cases of 'indecent' exposure, animal slaughter, or any other form of public nuisance, including drunken or improper

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<sup>22</sup> J.F. Stephen, *A History of The Criminal Law of England*, Vol 3. London, 1883, p. 310.

<sup>23</sup> See the successive forms of the Criminal Procedure Code: Act X of 1872, s. 521; Act V of 1882, Chap X; and Act V of 1898, Chap X.

<sup>24</sup> Civil Procedure Code (Act V of 1908), s. 91.

<sup>25</sup> *Jina Ranchhod v Jodha Ghella* 1 BHCR 1

<sup>26</sup> See, for example, Bombay Act XIV of 1842 on nuisances generally, and Bengal Regulation VII of 1824 which prohibited any fishing activity obstructing rivers.

<sup>27</sup> For Bengal Acts, see XXI of 1857 (Ss. 20-23), II of 1866 (Ss 40-41), IV of 1866 (Ss 66-70), III of 1884 (Ss. 350, 352, 367), II of 1888 (Ss. 221-316), I of 1899 (S. 3(33)) and III of 1899 (*passim*). For Bombay Acts, see II of 1865, III of 1872, VII of 1867, VIII of 1867, VI of 1873 (Ss. 30-79), and III of 1888. For Madras Acts, see I of 1884 (Ss. 283-367), and III of 1889. For the Punjab, see Act XX of 1891 (Ss. 90-136).

<sup>28</sup> D. Arnold, *Police Power and Colonial Rule: Madras 1859-1947* (Delhi, 1986) chaps. 2 & 3.

<sup>29</sup> Act V of 1861, Ss. 31 & 34. This Act was gradually extended by notification to most of the Bengal Presidency. Similar powers had been created under the *Madras Police Act* (XXIV of 1859) and were later extended to Bombay in the Bombay District Police Act (Act VII of 1867).



behaviour. In Bombay Presidency, the power to arrest and impose fines for a similar range of offenses was extended to village patels.<sup>30</sup> Refinements in nuisance legislation were introduced in a piecemeal fashion throughout the 1870s and 1880s, so that by the late 1890s the doctrine had become an important component in the institutional infrastructure of colonial 'law and order', which would ultimately be incorporated wholesale into the post-colonial regimes.<sup>31</sup>

Given the enormous legislative effort invested in public nuisance, what was its social impact? Despite late twentieth-century perceptions that the doctrine is moribund, its use in the colonial period was both frequent and vigorous. The nuisance provisions of the Indian Penal Code were invoked in all three Presidencies, but because many of the provisions required a magistrate's warrant for arrest,<sup>32</sup> the number of persons convicted under the Penal Code seldom exceeded more than a few thousand per year in all jurisdictions combined.<sup>33</sup> Even though warrants were obtained with ease,<sup>34</sup> police preferred to operate under the more speedy and less supervised local legislation. Thus it was in the petty administration of urban and rural social order that public nuisance really came into its own as a coercive device. Once arrested for public nuisance, the accused could anticipate a far higher likelihood of conviction than under any other criminal category. The total number of public nuisance convictions began to climb after the mid 1860s, and remained high well into the twentieth century (see Table 1). A police force growing in size and geographical

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<sup>30</sup> Bombay Village Police Act (VIII of 1867).

<sup>31</sup> In India, public nuisance was reaffirmed, with slight amendments, in 1973. See Law Commission of India, *Forty-Second Report: Indian Penal Code* (Delhi, Ministry of Law), pp. 222-224.

<sup>32</sup> Sir John Woodroffe, *Criminal Procedure in India* (Calcutta, 1926), pp. 126-131, 698-703.

<sup>33</sup> See *Report on the Administration of Criminal Justice in the Lower Provinces of Bengal* Annual Series; *Report on the Administration of Criminal and Civil Justice in the Bombay Presidency*, Annual Series.

<sup>34</sup> Typically, 80% to 90% of the reported offenses were followed with a warrant. See *Ibid.*

**TABLE 1:**  
**CONVICTIONS FOR COGNIZABLE CRIMES**  
**IN THE LOWER PROVINCES OF BENGAL, 1870 - 1904<sup>35</sup>**

Year	Public Nuisance Convictions	Total Convictions	Public Nuisance as % of Total	PN Convictions per 100,000 population
1870	5,202	33,832	15	
1871	5,737	35,147	16	
1872	8,346	46,107	18	
1873	7,956	48,543	16	
1874	8,053	55,468	15	13.44
1875	9,867	52,884	19	
1876	11,083	55,304	20	18.41
1877	10,483	54,531	19	
1878	10,238	58,589	17	16.72
1879	12,619	59,531	21	
1880	17,567	62,237	28	
1881	18,585	59,628	31	28.15
1882	21,567	62,905	34	
1883	23,450	59,590	39	
1884	20,953	62,276	34	
1885	18,395	58,590	31	
1886	19,168	58,746	33	
1887	19,145	57,025	34	
1888	21,218	60,134	35	
1889	25,756	66,997	38	
1890	27,402	68,673	40	
1891	32,160	73,559	44	45.61
1892	38,850	84,008	46	
1893	36,078	79,922	45	
1894	33,219	76,443	43	
1895	32,007	72,831	44	
1896	33,114	76,203	43	
1897	33,834	89,736	38	
1898	35,037	81,882	43	
1899	33,764	79,256	43	
1900	31,526	79,873	39	
1901	30,693	79,631	39	41.76
1902	30,354	77,216	39	
1903	28,592	75,105	38	
1904	30,673	75,027	41	

sed on *Report on the Administration of Criminal Justice in the Lower Provinces of Bengal*, Annual 870 - 1905. Comparable data are not available for the periods before 1870 or after 1905.

distribution intensified its efforts against a growing population. In the Lower Provinces of Bengal, public nuisance convictions accounted for 46% of criminal convictions in all categories in 1892.<sup>36</sup> The vigour of enforcement was reflected in the per capita rate of conviction as well. In 1873 there were 12.45 public nuisance convictions per 100,000, but this had nearly quadrupled 45.61 per 100,000 by 1891. The figures were even higher for urban areas. Oldenberg estimates that in Lucknow nearly one in every hundred persons was arrested for some form of public nuisance in the 1870s.<sup>37</sup> Between 1870 and 1920, public nuisance absorbed the single largest fraction of police energies in most parts of India. The exceptionally intense forms of policing associated with public nuisance were symptomatic of recurrent social conflict over the use of public space and physical resources. The high conviction rates demonstrate that state policy was at extreme variance with the modes of existence and conceptions of propriety which circulated under its authority. In experiential terms, each arrest offered a concrete manifestation of the oppressive nature of colonial rule.

Economically marginalised groups were most affected by such conflicts. The patterns of conviction and appeal under public nuisance headings indicate that the majority of prosecutions were against the dispossessed. Examining the Lower Bengal figures again, it appears that of the 523,021 convictions for public nuisance in the years 1871 to 1896, those which occurred on appeal numbered only five, or roughly one out of every 104,000. In sharp contrast with other categories of crime, which frequently went on appeal, almost no public nuisance convictions went to appeal during this time period. Given the stiff fines<sup>38</sup> attached to most nuisance provisions,

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<sup>36</sup> Derived from *Report on the Police of the Lower Provinces of the Bengal Presidency*, 1893.

<sup>37</sup> V.T. Oldenberg, *The Making of Colonial Lucknow 1856-1877* (Princeton, 1984), p. 72.

<sup>38</sup> The standard fine in the Municipal legislation was Rs. 50, though it was as much as Rs. 500 for fouling water under the Penal Code. Few people would have had access to such sums, and in default, would have liable for imprisonment for periods up to six months.

a higher appeal rate would be expected. The most plausible explanation for the pattern is simply that most of those convicted lacked the financial resources necessary to sustain an appeal. Moreover, the economically marginal groups who most frequently were subject to public nuisance penalties lacked familiarity with the niceties of legal procedures as well as personal connections with lawyers who might advise them in mounting a defense. This may also have contributed to the high rate of convictions. In the years for which comparable data are available for the Lower Provinces of Bengal (1884-1896), the likelihood of conviction for public nuisance was consistently between 91% and 95%, while the mean probability of conviction under all criminal headings was substantially lower at 67% to 76%.<sup>39</sup> If the defendant failed to produce countervailing evidence or systematic legal argument before the magistrate, a conviction was almost certain based upon a the police report. Similarly, without a vigorous legal defense, an order could be passed under the Criminal Procedure Code on the basis of 'quite slight evidence'.<sup>40</sup>

Newspaper reports confirm that low-caste and non-proprietorial groups were most likely to be arrested for nuisance. Newspapers frequently complained of injustice in the application of nuisance laws, particularly in relation to public urination and defecation. For instance, the *Hitavarta* of 1 January 1905 registered a fairly typical complaint of the way in which nuisance laws were introduced:<sup>41</sup>

Act V [of 1861] was not hitherto in force in Bhawanipore and people used the road-side drains to answer the call of nature. All of a sudden it came to be known that persons were being arrested for committing nuisances by the side of the roads. The enforcement of the Act was not made known by the beat of drum. How were people to know then that the Act was brought in force there? . . . Is this not injustice to the poor? The Municipality should

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<sup>39</sup> *Report on the Police of the Lower Provinces of the Bengal Presidency*, Annual Series, 1884-1896. The mean for all categories is heavily skewed by the higher conviction rates witnessed in public nuisance. The conviction rates for categories other than public nuisance varied between 54% and 61% for the same time period.

<sup>40</sup> A. Sabonadiere, *The Trial of Criminal Cases in India* (Calcutta, 1926), p. 447.

<sup>41</sup> (Calcutta) 1 Jan 1905. Newspaper quotations are from the *Reports from Native Papers (Bengal)* and *Reports from Native Papers (Bombay)*.

have provided urinals at short intervals and then informed the public of the operation of the Act by beat of drum.

The lax procedural requirements and high conviction rates made public nuisance an ideal vehicle for police harassment. The spectacular rise in nuisance arrests between the late 1860s to the mid 1880s accompanied frequent complaints in the native papers regarding the oppressive character of policing. The Constabulary in most areas was notoriously allied with propertied and dominant elements of society. Once a private individual had complained of a nuisance to a Magistrate of the First Class, summary powers were automatically invoked. Arbitrary arrests and false prosecutions appear to have been accompanied by inconsistent sentencing policies. The 'terrible severity' of the criminal justice system seems to have been felt more keenly in urban areas where defendants were frequently separated from the social support networks of kin and community.<sup>42</sup> Public nuisance played into the hands of police who seemed to believe that they possessed 'a perfect right to make use of their powers for the attainment of their own objects, for the exhibition of authority, or the promotion of self-glory.'<sup>43</sup>

Police tyranny was not uniquely a feature of public nuisance laws alone, but it highlights how extensive and oppressive the low-level conflict around nuisance actually was. Official efforts to transform the human environment met with a tenacious resistance not only because material goods were at stake, but also because nuisance laws violated accepted understandings of environmental management. Though these antagonisms involved seemingly mundane matters such as urinating in public and selling wares on the street, it was precisely their commonplace character which made them central to the concrete experience of governance under colonial rule.

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<sup>42</sup> *Amrita Bazar Patrika* (Calcutta) 11 May 1876 & 18 May 1876.

<sup>43</sup> *Soma Prakash* (Bhowanipore) 12 June 1876.

### III

What was at stake in these conflicts? If the animosities were driven by material interest, their expression hinged on incompatible social propositions. The public nuisance doctrine housed the ingredients of a fundamentally anthropocentric approach to the natural world.<sup>44</sup> The legal essence of nuisance lay in a 'common injury, danger, or annoyance to the public' or 'to persons who may have occasion to use any public right.'<sup>45</sup> Macaulay emphasised that the criterion for criminality lay in the want of due regard for humans, rather than for the physical world.<sup>46</sup> A nuisance was thus any entity 'working hurt inconvenience or damage or infringement upon the enjoyment of a territorial or personal right' -- of a person.<sup>47</sup> If the action in question did not directly affect a person (or group of people), it could not be a nuisance.<sup>48</sup> Since only humans<sup>49</sup> were recognised as bearing rights in law, no protection could be afforded to the physical environment without a proximate injury to persons.<sup>50</sup> To be less abstract about this, the death of a cow in a mudslide only assumed legal import where humans either held an interest in the cow or a responsibility for the mudslide. Without a human interest of some kind, objects in the natural world (including plants and animals) were legally irrelevant.<sup>51</sup> Some variety of harm to a person was required to

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<sup>44</sup> Legal anthropocentrism continued well into the nineteenth century even though its embodiment in English social codes was partially undermined by the end of the eighteenth century. K. Thomas, *Man and the Natural World* (London, 1983).

<sup>45</sup> Indian Penal Code, Sec 268. The *General Clauses Act* (X of 1897) made this definition apply to all legislation made after January 1868.

<sup>46</sup> Law Commissioners, *Second Report*, p. 408.

<sup>47</sup> Sir John Woodroffe, *Criminal Procedure in India* (Calcutta, 1926), p. 127.

<sup>48</sup> *Empress v Prayag Singh* ILR 9 Cal 103 (1882).

<sup>49</sup> Responsibilities also lay with collections of individuals, ie legally-recognised corporations. The limited recognition afforded to intra-cosmic gods in litigation over temple property is inconsequential for the purposes of this discussion.

<sup>50</sup> There was one important exception. Cruelty to animals was treated as a public nuisance in some of the earlier statutes (eg. the *Police Act*, 1861, Sec 34) and was prohibited more systematically in the *Prevention of Cruelty to Animals Act* (XI of 1890).<sup>12</sup>

<sup>51</sup> This legal legacy is explored further in C.D. Stone, *Should Trees Have Standing?: Toward Legal Rights for Natural Objects* (Los Altos, 1974).

institute legal action. If the act in question did not directly affect a person, it could not be a nuisance.

But the anthropocentrism of nuisance is rooted at a deeper level. Implicit within public nuisance was the conceptual legacy of Roman Law which deployed the 'juridical trinity of person, thing, and action'<sup>52</sup> as the basic categories of legal thought. This system placed individual volition and responsibility at the centre of legal relations, endowing persons with entitlements in a world of things and actions. From the legal perspective, the 'reality' extrinsic to individual volition acquired meaning only in juxtaposition with the values and interests of that volition.<sup>53</sup> At the most fundamental level, public nuisance posited that the value of the physical world lay in its instrumental relation to humans rather than in any intrinsic worth.

Instrumentality found legal expression through the principle of private property. Indeed, perhaps the most enduring ecological legacy of the Raj was the drive to subject the natural world to the legal doctrine of property. Though private property principally took the form of a territorial delineation of soil, there existed a more ambitious, if often latent, tendency to apply the doctrine further. Under common law principles, an individual who owned a piece of soil was also 'entitled to all the space of air above to the sky, and all the earth below to the centre.'<sup>54</sup> By this method, property holders were able to invest a proprietorial interest in the use of the atmosphere and subterranean resources such as minerals and water. Similarly, riparian proprietors were entitled to the use, purity, and uninterrupted flow of the rivers and streams adjacent to their property. While there was no right of ownership

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<sup>52</sup> D.R. Kelley, 'Hermes, Clio, Themis: Historical Interpretation and Legal Hermeneutics' *Journal of Modern History*, 55, 1983, p. 662.

<sup>53</sup> The impact of this Roman law premise is traced in D.R. Kelley, 'Gaius Noster: Substructures of Western Social Thought' *American Historical Review*, 89 (1979): 619-48.

<sup>54</sup> David Gibbons, *A Treatise on the Law of Dilapidations and Nuisances* (London, 1849), p. 362. The doctrine is derived ultimately from W. Blackstone, *Commentaries*, Vol 2., 18.

to the water itself, the appurtenant use of the water was formally subject to a rights logic, guaranteeing riparian owners access for drinking, bathing, washing, and feeding cattle.<sup>55</sup> Indeed, in the hands of Victorian jurists, the property principle could be extended almost infinitely, so that in theory anyway, a grid of rights and duties was superimposed on the world of animate and inanimate objects. The grid offered a powerful reinterpretation of the relations between humans and the physical world so that the latter was construed as a set of natural resources, endowed with a quantifiable monetary value for purposes of production and trade.

This is not to suggest that private property completely revolutionised relations between humans and their surroundings, for its implementation was often half-hearted and its social efficacy limited. The logic of property was mitigated by concessions to state rights and customary claims,<sup>56</sup> so that a variety of arrangements actually governed the use of resources. Nevertheless, the private property credo housed a radical legal premise: that the natural world could be divided into privately-held parcels and made subject to the aggregate will of proprietorial interests. Obligations towards other elements of the biosphere could thus be mediated, in theory at least, through atomised, individuated units of territory. Each private parcel of the world became subject to the desires of the owner, who was entitled to conserve, use, or destroy the endowment of resources which attended proprietorship. Indeed, a frequent

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<sup>55</sup> Lal Mohun Doss, *The Law of Riparian Rights, Alluvion, and Fishery*. Calcutta: Thacker, 1891, pp. 256-284.

<sup>56</sup> An important exception to exclusive property rights could be found in the law of easements. Under the *Indian Easements Act* (V of 1882), Indian courts were willing to curtail exclusive private property rights in favour of customary entitlements. Thus, the courts upheld: the right to maintain a latrine on another's land (*Hera Lal v Lokenath Shah* AIR 1916 Cal 787); the right to bury or cremate bodies on another's land (*Gopal Krishna Sil v Abdul Samad* AIR 1921 Cal 569, *Kirpa Singh v Nabi Baksh* AIR 1932 Lah 256, *Jogesh Chandra v Niranjana* AIR 1935 Cal 357); and the right to discharge foul waters, including latrine waste, on another's land (*Tarak Nath v Ram Nath* AIR 1935 Lah 346, *Brij Mohan Lal v Hazari Lal* AIR 1936 All 90); cf. G.C Mathur, *Amin & Sastri's Law of Easements*, 5th ed., (Lucknow, 1984), pp. 105-108. The key issue here, of course, is that easement rights were enforceable only where the easement-holder possessed the local preeminence or legal resources to override property rights. Disempowered and landless groups frequently were denied similar rights by magistrates.



justification for private landholding was that in subjecting the natural world to a private will, it encouraged the holder to transform natural endowments into marketable goods.

Prior to 1860, the state's involvement with environmental resources had been primarily incidental -- the by-product of policies relating to revenue and commerce. But by 1900 a number of statutes embodied an explicit recognition of environmental resources. The law of nuisance was introduced at the time when the Raj was making its most strenuous efforts to harness territorial and personal rights to a nascent market economy.<sup>57</sup> Since the bulk of production lay in the agrarian sector, it was a market economy in which the primary relations of production -- including labour processes and resource control -- were symbolised and organised through human interactions with the land and other physical surroundings. The significance of nuisance its potential for enforcing the private rights which were being asserted by proprietorial interests.

Most nuisance actions relating directly to individual property rights were brought as private nuisances.<sup>58</sup> However, under common law principles, an individual could institute a civil suit in the case of a public nuisance if he or she had sustained special damage.<sup>59</sup> But proving special damage could be difficult,<sup>60</sup> and it was only after the 1908 Code of Civil Procedure provided exceptions to the special damage rule that private property holders were able to enforce exclusive property

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<sup>57</sup> The argument for the transition to a market economy after 1860 is made most cogently by D.A. Washbrook, 'Law, State and Agrarian Society in Colonial India' *Modern Asian Studies*, 15, (1981), pp. 670-673.

<sup>58</sup> See the cases cited in B.M. Gandhi, *Law of Tort* (Lucknow, 1987), chap 17.

<sup>59</sup> Proceedings under the Criminal Procedure Code could not bar a civil suit. See *Raj Koomar Singh v Shahebzada Roy* ILR 3 Cal 20 (1878), and *Chunilal v Ram Kishen Sahu* ILR 15 Cal 460 (1888).

<sup>60</sup> The strict English law requirement of special damage was introduced as a rule of 'equity and good conscience' *Adamson v Arumugam* ILR 9 Mad 463 (1886); *Raj Narain Metter v Ekadasi Bag* 27 Cal 793 (1900).

rights more freely.<sup>61</sup> Propertied groups were able in many instances to invoke public nuisance provisions against anyone threatening the value of their property. The frequency of these claims gave rise to some alarm in judicial circles. Where public nuisance complaints were blatantly driven by private material interests, some judges were prompted to issue warnings of abusive or improper litigation.<sup>62</sup>

#### IV

The law of nuisance played an important role in the appropriation and reconstitution of a specifically 'public' social space.<sup>63</sup> Nuisance applied most intensively to key geographical features -- particularly roads, rivers, wells, ports, and urban areas -- which were of vital economic and political importance to the colonial regime. They represented points of vulnerability in the juridically-defined landscape, and became subject to the criminal strictures which accompanied public property. Precisely because the road, river and city were policed public spaces, they became distinguished from the landscape by their juridical attributes. What counted as public space received much of its definition from the threat of legal sanction, so that while it was perfectly legal to urinate in the open on one's own property (if one had property), it was not legal alongside a public thoroughfare. This curious distinction bore no direct causal link to public health, or community morality, yet it became a fundamental

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<sup>61</sup> Act V of 1908, S. 91. Though the special damages requirement had been lifted, the permission of the Advocate-General was now required to institute a suit under this section. Obviously, only litigants with adequate legal resources and government approval could use this provision with good effect.

<sup>62</sup> *Farzand Ali v Hakim Ali* 16 Cr LJ 40 (1915); *Becharam Ghorooee vs Boistubnath Bhooyan* 14 WR 177 (1870).

<sup>63</sup> For legal purposes, a place was 'public' if 'the public were in the habit of resorting to it and no one prevented them from doing so.' *Sukhnandan Singh v Emperor* 23 Cr LJ 67 (1922), at p. 68, following *Reg v Wellard* 14 QBD 63 (1885). This quasi-tautologous definition gave magistrates wide latitude for redefining public space according to the needs of the moment. See further *Khushi Ram v Emperor* 24 Cr LJ 457 (1923).

social classification, embedded in the concrete experience of arrest and conviction.

Unlike private property, public property was not given over to the will of a single person. For this reason, it was sometimes viewed as an umbrella for shielding existing arrangements for appropriating physical space and guaranteeing rights of access. In practice, public property did not leave past practices undisturbed: it introduced a fresh geopolitical ordering with new ways of designating territories and regulating access. After 1860, creation of public property was a growth industry for the colonial state. Using eminent domain to seize lands controlled by individuals and groups, new public spaces assumed a number of forms, including forests, ports, transport depots, railway tracks, roads, parks, and public buildings. The area under public authority expanded significantly by 1900. Extending a state monopoly over the use of key elements in the biosphere did not amount to the preservation of common access. Once a site was designated as public, the law of public nuisance could be used to exclude groups with customary entitlements to its use. At the same time, these resources could be made available on a preferential basis for specific private interests which enjoyed the state's patronage.

Exclusion was thus a principal function of public nuisance. As existing patterns of resource use were outlawed, many people found themselves stripped of the customary entitlements on which they depended for daily survival. Nuisance served as the coercive arm of property rights, and permitted new entrepreneurial and middle class groups to sustain an attack on the customary rights of those with limited access to productive resources. The diminution in customary rights accompanied an increase in the exercise of state police power.

The transfer of forest resources from subsistence to commercial users has been

well documented.<sup>64</sup> Similar transformations occurred with navigable rivers and other waterways. In 1856 the Privy Council affirmed that the East India Company possessed a freehold in the bed of any navigable river and all intertidal zones.<sup>65</sup> Despite a number of legal challenges, the courts repeatedly held that riverbed rights lay exclusively in the hands of the Government.<sup>66</sup> The process of extending state control over navigable rivers was largely complete by 1915. The overriding concern seems to have been to ensure a clear navigable passage for European commerce.

The charge of obstructing a public space served to displace many users. Long-standing fishing practices which relied on the construction of weirs and bamboo traps were prohibited in a number of cases.<sup>67</sup> In the process, groups with customary entitlements to fishing locations were dislocated, or their fishing practices prohibited,<sup>68</sup> permitting the state to sell fishing rights to specific private interests.<sup>69</sup>

Similarly, small dams built for purposes of irrigation and community use were sometimes destroyed as obstructions to navigation, or to make way for larger state-sponsored irrigation projects. Even where long-standing usufruct entitlements existed, they would not be validated as custom unless stringent legal tests were satisfied,

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<sup>64</sup> Chhatrapati Singh, *Common Property and Common Poverty* (Delhi, 1986); Ramachandra Guha, 'Forestry and Social Protest in British Kumaun, c. 1893-1921' in R. Guha, ed., *Subaltern Studies IV* (Delhi, 1985); Ramachandra Guha & Madhav Gadgil 'State Forestry and Social Conflict in British India' *Past and Present*, 123, (1989).

<sup>65</sup> *Doe dem Seebkristo v East India Company* 6 MIA 267 (1856).

<sup>66</sup> The Privy Council was unequivocal on this point, and gave support to an aggressive exclusivism in the lower courts. See *Kali Kishen Tagore v Jodoo Lall Mullick* 6 IA 190 (1879).

<sup>67</sup> See for instance, *Queen v Vitti Chokkan* ILR 4 Mad 229 (1882); *In re Umesh Chandra Kur* ILR 14 Cal 656 (1887). Cf. *Jugal Das Dalal vs Queen Empress* ILR 20 Cal 665 (1893) in which a *jag* constructed to protect private property from diluvion was permitted.

<sup>68</sup> *Empress v Halodhur Poroe* ILR 2 Cal 383 (1877).

<sup>69</sup> *Chundre Juleah v Ram Churn Mookerjee* 15 WR 212 (1871).

namely that the custom was proven to be ‘ancient, invariable, and reasonable’.<sup>70</sup> The use of public roads provided another locus of conflict. Roads that had been the stage for itinerant hawkers, occasional markets, and small-scale manufacturing fell under the prohibition on obstructions.<sup>71</sup> Any encroachment on a public road, no matter how small or harmless, could be made the object of prosecution.<sup>72</sup> Gambling in the streets was particularly singled out for elimination, and could be banned as a public obstruction in those areas where the various Gambling Acts did not apply.<sup>73</sup> While the social and recreational dimensions of street life continued, they were now subject to principles of public order endorsed by new middle class groups.

In a similar way, small producers were displaced from public property on the grounds that their activities were polluting. As early as 1708 the use of fish-manure was prohibited in Bombay on the grounds of its odour. Thereafter, complaints of unsavoury odours prompted officials to make periodic attempts at containing the use of fish products by the ‘lower classes’.<sup>74</sup> Water-dependent processes were subject to policing under section 277 of the Penal Code. The widespread practice of soaking small quantities of vegetable matter, such as aloes and tur plants, met with arrest and conviction in several cases.<sup>75</sup> Small-scale fishing practices could be subject to the

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<sup>70</sup> *Eshan Chandra Samanta v Nil Moni Singh* ILR 35 Cal 851 (1908); see further on waterway obstructions *Zaffar Nawab v Emperor* ILR 32 Cal 930 (1904), *Bharosa Patak v Emperor* 13 Cr LJ 183 (1912), and *Jagarnath Setu v Parmeshwar Narain* ILR 36 All 209 (1914).

<sup>71</sup> The early case of *Reg v Dulsukram Haribhai* [1 BHCR 407 (1866)] reveals community opposition to street-clearing, with a jury refusing to find a nuisance. See also *Queen Empress v Kedar Nath* ILR 23 All 159 (1900), by which time the state power to clear streets had been fully consolidated.

<sup>72</sup> *Nisar Mohamad v Emperor* ILR 6 Lah 203 (1925).

<sup>73</sup> See, for instance, *Emperor v Madho Ram* 4 Cr LJ 492 (1906). But courts did not always deem gambling a public nuisance, it was held to depend on the degree of public annoyance and inconvenience involved: *Sasi Kumar Bose v Emperor* 7 CWN 710 (1903).

<sup>74</sup> R.P. Masani, *Evolution of Local Self-Government in Bombay* (London, 1929), p. 63.

<sup>75</sup> *Emperor v Nama Rama* 16 Bom LR 52 (1904); *Queen-Empress v Vithoba* Rat UCC 203 (1884).

same treatment.<sup>76</sup> Where public wells deteriorated under the strain of overuse and inadequate maintenance, officials often responded by arresting local users, or closing down the wells entirely rather than investing in necessary refurbishment.<sup>77</sup> While riparian proprietors were permitted to wash bullocks in waterways adjacent to their property, non-proprietors engaged in the same action were subject to arrest for fouling the water.<sup>78</sup> Similarly, arrests were made for bathing in a stream, washing fish in a *nullah*, and cultivating paddy in the bed of a tank.<sup>79</sup>

Those who found themselves dispossessed had few defenses. In the eyes of the law, an act was a nuisance to the public even if it was perfectly lawful and conducted entirely on private property in a morally proper manner. The illegality arose from the consequences, not the intent.<sup>80</sup> Most important, the existence of a customary right or time-honoured entitlement was not recognised as a legitimate defense,<sup>81</sup> nor was the argument that the nuisance represented a convenience or advantage.<sup>82</sup>

For all that public nuisance served to displace customary users of collective resources, it provided little protection for subaltern groups who found their living environments and productive resources being damaged by new technologies and undertakings. The legal establishment was hesitant to act against large manufacturing and business interests, particularly if they were owned or operated by Europeans. Jute dealers in Jessore, for instance, were allowed to soak large quantities

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<sup>76</sup> *Empress v Halodhur Poroe* ILR 2 Cal 383 (1877).

<sup>77</sup> *Jam-e-Jamshed* (Bombay) 14 June 1912; *Rast Gofar* (Bombay) 7 July 1912.

<sup>78</sup> *Queen v Vitti Chokkan* ILR 4 Mad 229 (1882).

<sup>79</sup> *Nilappa Dayappa* Rat UCC 963 (1898).

<sup>80</sup> *Nisar Mahomad v Emperor* ILR 6 Lah 203.

<sup>81</sup> *Municipal Commissioners v Mohamad Ali* 7 Ben LR 499 (1871).

<sup>82</sup> *Bharosa Patak v Emperor* 13 Cr LJ 183 (1912).

of jute in local streams which served as the only source of drinking-water for a number of villages. Though fish died in large numbers as the streams became clogged and unsuitable for human consumption, the Municipality refused to take decisive action against the jute dealers.<sup>83</sup> Similarly, though the waste water from cotton mills often poured directly into waterways used for domestic purposes, complaints normally met with little or no effective action on the part of municipal officials.<sup>84</sup> Neither the police nor the courts were eager to pin a nuisance charge on a member of the 'respectable' classes. Public nuisance laws were not frequently enforced against propertied offenders. While low-caste groups were regularly prevented from using rivers for washing and bathing, the innumerable landing-places and bathing-ghats constructed mostly by pious Hindus were tolerated by state authorities even though they were clearly encroachments upon the public domain under the law.<sup>85</sup>

## V

Public nuisance laws were applied most vigorously in cities, which presented officials with particularly urgent problems of social order. Because urban populations were not immediately located in agrarian production, they were automatically removed from what many British imagined as the organic social order of peasant society which gave shape and discipline to native life. As urbanisation accelerated, cities were increasingly regarded as places of moral and physical danger. Though cities retained the association with civility and learning, their physical deterioration heightened already-existing rural antipathies. Increasing density, foul water, faeces in the streets,

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<sup>83</sup> *Sanjivani* (Calcutta) 27 July 1905; *Daily Hitavadi* (Calcutta) 20 Sept 1905.

<sup>84</sup> *Kalpatra* (Sholapur) 25 Feb 1912.

<sup>85</sup> Lal Mohun Doss, *The Law of Riparian Rights, Alluvion and Fishery* (Calcutta, 1891), p. 273.

and seemingly inescapable noise may have contributed to a sense of disorder. The dangers of urban life lay less in its physical attributes than in the moral character of its inhabitants which threatened commerce and political order as well as the criteria of a rural aesthetic. Cities were said to be riddled with disease, prostitution, and increasingly with political extremism. The physical condition of the larger cities was not merely a matter of health and comfort; as imperial ideology gained ground, these cities became signifiers of imperial strength as well as showcases for the promise of prosperity.

Such problems of urbanisation were hardly unique to India, and comparative evidence suggests that other societies have found the solution in expanded infrastructural investment. Whether channelled through the state, or private charity, an injection of capital derived from wealthier groups is an essential ingredient in sustaining commerce and manufacturing in any city. By 1860, many of the cities of British India were in crisis. Most already suffered from decades of underinvestment in public amenities.<sup>86</sup> The mechanisms of civic investment which operated in the precolonial period were disrupted by political and economic changes under colonial rule, and were never fully revived.<sup>87</sup> New conurbations had grown in a haphazard way without sufficient infrastructure. The new demands generated by sanitation schemes and accelerating urbanisation was to exacerbate the crisis further. Faced with perennial financial constraints, ambitious programmes for urban improvement, including sanitation, water-supply, and housing, were partially or imperfectly implemented. Two factors appear to have exacerbated the problem. First, demographic pressures forced larger numbers of landless to live on 'waste' lands and

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<sup>86</sup> Dossal, *Imperial Designs*, chap 2; AK Bagchi, 'Wealth and Work in Calcutta, 1860-1921' in S. Chaudhuri, ed., *Calcutta: The Living City* (Volume I: The Past) (Oxford, 1990).

<sup>87</sup> N. Gupta, 'Urbanism in South India: Eighteenth-Nineteenth Centuries' in I. Banga, *The City in Indian History* (Delhi, 1991).



public terrain. Second, accelerated urbanisation driven primarily by rural 'push' factors increased the urban labour force far more quickly than it could be incorporated into waged employment. The Raj proceeded to contain the symptoms of the burgeoning infrastructural crisis by applying greater doses of police power to the dispossessed who relied heavily upon common property resources for subsistence.

Probably the most frequent justification for nuisance arrests was that of sanitary imperatives. With the foundation of the Sanitary Department in 1864, a professional cadre came into being which would press for sanitary reforms, including the more rigorous implementation of nuisance laws.<sup>88</sup> Standard practice after the late 1860s required the head constable of each police thana to inspect the area for public nuisances on a daily basis.<sup>89</sup> Arrests were widespread and conducted with some enthusiasm. In the few cases where such arrests went on appeal, the courts were sometimes willing to grant a reprieve, as in the case of the man who was convicted of making the atmosphere noxious to health 'in that he was caught performing the offices of nature in front of his door-step.'<sup>90</sup> Sanitary efforts met with a mixed response. While newspaper reports reveal frequent complaints concerning the unsanitary practices of low-caste groups, there was also distress at the way in which nuisance laws were sometimes directed against persons of respectable standing in the community. And while sanitary efforts were largely welcomed by the urban elite, protests were raised when latrines were located near shrines or temples.<sup>91</sup>

While the urban middle classes could rely upon abundant and well-maintained

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<sup>88</sup> D. Arnold, 'Cholera and Colonialism in British India' *Past and Present*, 113, 1986; and M. Harrison, 'Towards a Sanitary Utopia? Professional Visions and Public Health in India, 1880-1914' *South Asia Research*, 10, 1990.

<sup>89</sup> Oldenburg, *The Making*, pp. 105-6.

<sup>90</sup> *Queen Empress v Mahadshet* Rat UCC 200 (1884).

<sup>91</sup> *Kaiser-i-Hind* (Bombay) 30 June 1912; *Rast Goftar* (Bombay) 15 Dec 1912.

latrines and secluded bathing facilities, landless groups were forced into using public lands and waters both to meet their bodily needs and in the pursuit of economic activities. Precisely because their material existence was more closely dependent upon the use of waste lands and public water sources, dispossessed groups were structurally disposed to run afoul of nuisance laws. Moreover, as already noted, the physical and economic rhythms of their lives would be more likely to lead to public urination, washing in rivers, and relying generally upon public natural resources for subsistence. Press reports indicate that 'coolies' were frequently arrested without prior warning for public urination and defecation, even where their actions were condoned by long-standing practice and local understandings.<sup>92</sup>

Economically marginal groups not only suffered from this structural bias, they also fell foul of discriminatory enforcement. At one level this is perhaps not surprising since the 'lower orders' were routinely associated with crime of all types. They were also subject to heavy fines, even though they rarely had access to latrines.<sup>93</sup> A person of the 'respectable' classes were less likely to meet with arrest, and would almost certainly secure an acquittal based on social status anyway.<sup>94</sup>

Differential legal treatment reflected unequal social positions, and it may be useful to consider these differences in terms of the economic functions of common property resources in urban areas. A distinction may be drawn between two social classes based upon their relation to productive resources. One class comprised those who relied upon rivers, streets, and waste-lands as key resources in the daily conduct of production and subsistence. The other class did not depend immediately upon

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<sup>92</sup> *Hitavarta* (Calcutta), 1 Jan 1905.

<sup>93</sup> *Amrita Bazar Patrika* (Calcutta) 19 May 1905.

<sup>94</sup> This was especially true toward the end of the colonial period, when some of the strictures on public urination seem to have relaxed somewhat. Compare the different approaches in *Lallu Ram v Crown* AIR 1924 All 194, and *In re Vedagiri Perumal Naidu* AIR 1937 Mad 130.

common property resources for subsistence, but tended to look upon common property as the raw material from which public order and an aesthetically-gratifying quality of life could be built. Ideal models of environmental ordering closely reflected the economic uses of the physical world. In the play of social forces associated with municipal politics, these imperatives were incorporated into the strategies of urban elites seeking to define the social divisions of physical space in terms of a new environmental order.

By the late 19th century the increasing professionalisation of public health and town planning brought new institutions for restructuring environmental practices. In part, Indian planning was simply a mimetic corollary of urban planning in Europe. However, it was also a response to the limitations inherent in a public nuisance approach. As a device to control the geography of social life, the law of nuisance was limited by its fundamentally retroactive character. Nuisance could deal with existing obstructions and irritations, but provided the Magistrate with no power to direct what should be done in the case of future nuisances.<sup>95</sup> The structural need for a geographical policing which was less *ad hoc* highlighted the limitations of nuisance laws. Urban planning permitted a more systematic, and consequently more bureaucratic, approach to environmental policing.

## VI

What was the ideological content of this new vision of environmental order? The judicial idiom of nuisance combined elements of morality, health, and political order in different proportions depending upon the circumstances. The key issues were resolved in terms of the entrepreneurial possibilities and aesthetic proclivities of people, rather

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<sup>95</sup> *Kashi Chuder Chuckerbutty v Yar Mahomed* 21 WR Cr 10 (1874).

than the intrinsic value of the physical world in itself. For many Europeans, the social use of the environment served as a vehicle for imagining differences between coloniser and colonised. For instance, the *Daily Telegraph*, in commenting on the beggars, lepers, stray dogs, and general unsanitary conditions to be found in the Reay market of Poona, opined that 'these are the features of the unchanging East that need having attention called to them'.<sup>96</sup> The approach taken to environmental 'improvement'<sup>97</sup> was closely involved with ideas of paternalistic rule and reform from above. The practice of clearing obstructed streets, draining stagnant basins, and arresting coolies defecating in public view was not just a way of keeping public areas free-flowing and healthy, it was seen as a method for imposing civilised order on an otherwise disorderly social world. By the 1880s, it was agreed that the district administrator's task was to cajole order out of chaos.<sup>98</sup> Accordingly, a main tenet of the nuisance jurisprudence was that physical comfort should be understood with reference to the climate and habits of the country, affirming what is understood to be ordinary comfort rather than the tastes of the particularly fastidious.

It is evident that official policies operated in tandem with the demands of middle class groups, particularly in urban areas. The newspaper accounts, which largely reflected a middle class viewpoint, were filled with complaints of public defecation, polluted and unmaintained tanks, stagnant bodies of water, and the noxious smells of manure and market. There was a close interaction and tension between the differing conceptions of pollution, where notions of ritual purity associated with caste status operated in tandem with shifting 'scientific' approaches to hygiene

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<sup>96</sup> *Daily Telegraph* (Poona), 28 March 1911.

<sup>97</sup> With the promulgation of the various urban 'Improvement' Acts, the Victorian vocabulary of improvement increasingly served to frame urban policies between 1880 and 1915.

<sup>98</sup> An avowal of the colonial vocation is evocatively described in R. Carstairs, *The Little World of an Indian District Officer* (London, 1912).

and public health. In many cases, the two approaches converged. There was broad agreement the status of tanneries as a source of polluting effluvia, and efforts were generally taken to move such operations to areas designated for low-caste residence, normally beyond the confines of urban centres. Tanning was legally recognised as a source of severe pollution in England as well, but in India the 'leather nuisance' acquired a more profound and symbolic dimension. It seems that dispossessed groups, particularly those of low caste status, were a source of nuisance even in their very presence. Not only did landless groups obstruct public thoroughfares and occupy public lands, they were prone to 'freely pollute the open land'.<sup>99</sup> Moreover, low-caste groups were accused of polluting rivers by washing raw hides, straying beyond their designated bathing ghats, and failing to burn dead bodies completely.<sup>100</sup> Such perceptions sometimes conflicted with colonial ideologies, particularly in the use of wells. Rigid caste separations in the use of wells were primarily enforced by local systems of dominance, but police powers were repeatedly called upon to enforce the divisions with nuisance laws. Very few cases of these ever made it beyond the magistrate level, but in the few judgments which are available it is clear that colonial judges were uncomfortable with enforcing such distinctions through nuisance laws. It was firmly established that the use of an upper-caste well by a lower-caste person would not be treated as a nuisance within the ambit of the Indian Penal Code.<sup>101</sup> Related contradictions arose in the general attitude towards water pollution. European officials excoriated the belief that water was in itself a purifying substance which was vulnerable to ritual pollution through contact with lower castes, but

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<sup>99</sup> *Truth* (Howrah), 9 Jan 1905.

<sup>100</sup> *Dacca Prakash* 14 May 1905.

<sup>101</sup> *Empress v Ganpatya* 5 CPLR 20 (1882); *Empress v Pandia* 13 CPLR 92 (1900).

immune from the mundane material pollutions of foreign matter.<sup>102</sup>

Public nuisance was closely involved with systems of moral and political ordering. A recurrent issue before the courts was the conduct of prostitutes. Public nuisance complaints were invoked against prostitutes who strayed into 'respectable' middle class areas. For instance, in 1911 the *Indu Prakash*, complaining of prostitution in a 'quarter of educated middle classes of Bombay' advocated that municipal officials should contain the nuisance as in 'all civilised countries' in which 'the immoral section of a community is isolated from the general population'.<sup>103</sup> But officials were mindful of prostitution's role in servicing the military and socially prestigious groups, and were hesitant to interfere with prostitution so long as it was conducted 'orderly and quietly'.<sup>104</sup> Hence, open soliciting in a regimental barracks, or on the street, were permitted even though they may have caused actual annoyance to some local residents.<sup>105</sup> To much middle-class distress, prostitution was only treated as a nuisance when it was associated with excessive noise, a demonstrable outbreak of venereal disease, or some other material nuisance.<sup>106</sup>

Though the notion of 'public' was meant to be divorced from the interests of any individual or distinct grouping of individuals, the courts were willing to make the concept refer to a groups smaller than the public at large. Hence, single groups or communities were sometimes able to bring claims based upon a distinct community-specific grievance. For instance, newspaper reports reveal multiple complaints

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<sup>102</sup> Carstairs, *Little World*, p. 151.

<sup>103</sup> *Indu Prakash* (Bombay) 8 June 1911. See *Reports of Native Papers (Bombay)*, 1911, pp. 32-3, and *passim* for many more complaints of uncontrolled prostitution.

<sup>104</sup> *Queen v Mst Begum* 2 NWP 349 (1870); *Nundu v Anand* 24 WR Cr 68 (1875); *Basanta v Emperor* 5 CWN 566 (1901).

<sup>105</sup> *Queen-Empress v Raji* Rat UCC 765 (1895); *Queen-Empress v Nanni* ILR 22 All 113 (1899).

<sup>106</sup> Cf *Mst Nur Jan v Queen Empress* 1900 PR Cr 2.

against the slaughter of cows and the public sale of meat as a public nuisance. In one instance, the presence of a butcher shop incited objection on the grounds the sound of knives would disturb the children attending a nearby school. Such claims were normally dismissed by the courts, which held that the slaughter of cattle and public display of meat did not amount to a public nuisance.<sup>107</sup>

While state functionaries sought to treat the regulation of public goods as a simple matter of technical regulation, the native newspapers frequently portray it as an intensely political topic, associated with unjust bureaucratic rules and multiple opportunities for oppressions. The linkage between politics and religious idioms found expression partly through ecological issues. While the newspaper accounts shed little light on the politics of dispossessed groups, they do register the voices of respectable and pious classes concerned about the management of environmental resources. Frequent complaints arose concerning state failures to maintain and clean wells and tanks. However, objections also arose concerning the state's plans for sanitation. When the Septic Tank Committee recommended that sewage from jute mills be discharged directly into the Hooghly, the *Bengalee*<sup>108</sup> registered a representative objection:

The Committee are entirely mistaken when they say that the Hindus object to the pollution of the river on sentimental rather than religious grounds. The Hooghly is the last resting-place of their fore-fathers and is inseparably associated with ideas of eternal bliss to the Hindu mind, which naturally recoils in horror at the very thought of the pollution of their sacred river.

The alliance between the urban middle classes and colonial officials which had been consolidated around environmental issues in the last four decades of the nineteenth century was never without contradictions. As organised political movements grew more critical of colonial rule, there was a greater willingness on the part of urban

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<sup>107</sup> *Queen Empress v Zakiuddin* ILR 10 All 44 (1887); *Queen Empress v Hasan Sund* Rat UCC 903 (1897); and *Sheikh Amjad v King Emperor* ILR 21 Pat 315 (1942).

<sup>108</sup> (Calcutta) 18 January 1905.

elites to participate in criticisms of colonial environmental policies. This was especially true as official laxity with European businesses was brought to light.

## VII

To what extent were courts prepared to use public nuisance to contain the environmental harm caused by manufacturing and commercial interests? Some trades, such as tanning, were seen as inherently polluting and periodic efforts were made to move them out of urban areas entirely.<sup>109</sup> Other enterprises, such as coke-making were not treated as inherently polluting, but as prone to giving nuisance unless properly managed and operated. Legal officials were preoccupied with the polluting potential of small manufacturing enterprises, particularly those run by Indians, rather than the large-scale mills processing jute, cotton, and steel. Indeed, manufacturing and business interests were accorded remarkable freedom to pollute and degrade the environment.<sup>110</sup> We may assume that very few public nuisance cases were ever lodged against larger undertakings, since such prosecutions would almost certainly have gone on to appeal, and there are but a handful of reported cases in this area.

One of the major cases involved two sugar mills which freely poured effluents into the nearby river. The poor quality of the river water reportedly caused the deaths of several head of cattle, and 'nearly one hundred persons living in the neighbourhood of the river' complained to the magistrate. Upon investigation and appeal, the Patna court refused to uphold an order against the mills, arguing that in the absence of scientific evidence concerning the water quality, 'a totally illegal and unjust order

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<sup>109</sup> See, for example, Dossal, *Imperial Designs*, p. 202.

<sup>110</sup> This was especially true in the period before the First World War. See in particular *Shadi v Empress* PR 1888 Cr 31.



might be made against one of the Mills.’<sup>111</sup>

In related cases, the Lahore High Court was unwilling to take action against the smoke and stagnating pools of water associated with a brick kiln located adjacent to a college in Amritsar. The Court refused to take action against the kiln on the grounds that it was not the brick kiln trade itself, but rather the conduct of this particular brick kiln, which represented a nuisance.<sup>112</sup> Though courts were occasionally prepared to take action against mills which made excessive noise in residential areas,<sup>113</sup> such orders were infrequent, and sometimes set aside in order to prevent ‘a continued interference with the carrying on of the trade’ in question.<sup>114</sup>

By the turn of the century, a clear differentiation existed in public nuisance administration. Manufacturing and business interests were consulted informally about environmental complaints, and the standards applied were generally more lax than those applied to other elements of society. This was especially the case during the state drive to foster industrial growth in the early 1920s. In the meantime, petty resource users continued to be displaced and policed from both private and public lands. The overall effect of this discriminatory policy was to individualise the profits gained from resource use but to socialise the environmental costs under the banner of a new public order.

## VIII

There is a limit to what the history of public nuisance may reveal about the history of ecological change and social organisation. It is evidence of the application of

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<sup>111</sup> *Deshi Sugar Mill v Tupsi Kahar* AIR 1926 Pat 506, at 508.

<sup>112</sup> *Gokal Chand v Emperor* 21 Cr LJ 462 (1920).

<sup>113</sup> *Krishna Mohan Banerjee v AK Guha* 21 Cr LJ 669 (1920); *Munnalal Brahmin v Shridhar Rao Lele* AIR 1934 Nag 193.

<sup>114</sup> *Kedar Nath V Satish Chandra* AIR 1940 Oudh 75.

state power, but the experience of its application, and the impact upon social processes is largely excluded from the judicial record. But probably more than any other state-sponsored phenomenon, the criminal law defined, in remarkable detail, the acceptable forms of activity and sought to locate individuals in physical and social worlds. Those forms of activity were increasingly subject to a logic of property -- in both its private and public forms -- that mediated the use of technology and labour. The Foucauldian insight that juridical rights emerge from, and are framed by, institutions of discipline, is directly relevant here.

Nuisance laws were used to police the lower orders, and largely for the benefit of the safety, comfort, and economic prospects of Europeans and middle classes attempting to consolidate a hierarchy in the social co-ordinates of physical space. The long social struggle over the environment was a class struggle insofar as it related immediately to control over the means of production, but it was seldom understood in economic terms. The definitional equations of the public nuisance met with acts of individual and collective resistance, reflected in high numbers of arrests and convictions. Still, they contributed to the emergence of a view of the environment which would contribute to maintaining social distinctions well into the post-colonial period.

## **ABBREVIATIONS**

<b>AIR</b>	<b>All India Reporter</b>
<b>All</b>	<b>Allahabad</b>
<b>Ben LR</b>	<b>Bengal Law Reporter</b>
<b>BHCR</b>	<b>Bombay High Court Reports</b>
<b>Bom LR</b>	<b>Bombay Law Reporter</b>
<b>Cal</b>	<b>Calcutta</b>
<b>CrLJ</b>	<b>Criminal Law Journal</b>
<b>CPLR</b>	<b>Central Provinces Law Reports</b>
<b>CWN</b>	<b>Calcutta Weekly Notes</b>
<b>IA</b>	<b>Indian Appeals</b>
<b>ILR</b>	<b>Indian Law Reports</b>
<b>Lah</b>	<b>Lahore</b>
<b>Mad</b>	<b>Madras</b>
<b>MIA</b>	<b>Moore's Indian Appeals</b>
<b>NWP</b>	<b>North-West Provinces High Court Reports</b>
<b>PR</b>	<b>Punjab Record</b>
<b>Rat UCC</b>	<b>Ratanlal's Unreported Criminal Cases (Bombay HC, 1862-98)</b>
<b>WR</b>	<b>[Sutherland's] Weekly Reporter</b>